Reasonable Adjustment and the Assessment of Students with Disabilities: Australian Legal Issues and Trends

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This paper explains the legislation which underpins the right to reasonable adjustment in education in Australian schools. It gives examples of the kinds of adjustment which may be made to promote equality of opportunity in the area of assessment. It also considers some of the controversies which case law indicates have confronted, or are likely to confront Australian education institutions as they work towards compliance with reasonable adjustment laws.

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Student assessment is particularly important, and particularly controversial, because it is the means by which student achievement is determined. Reasonable adjustment to student assessment is of equal importance as the means of ensuring the mitigation, or even elimination, of disability related barriers to the demonstration of student achievement. The significance of reasonable adjustment is obvious in the later years of secondary school, and in the tertiary sector, because failure to adjust assessment may be asserted as the reason a student did not achieve as well as anticipated or as the reason a student was excluded from a course and, as a result, from future study and employment opportunities. Even in the early years of schooling, however, assessment and its management are a critical issue for staff and students, especially in an education system like Australia's with an ever increasing emphasis on national benchmarks testing.[1]

This paper will explain the legislation which underpins the right to reasonable adjustment in education in Australian schools. It will give examples of the kinds of adjustment which may be made to promote equality of opportunity in the area of assessment. It will also consider some of the controversies which have confronted, or which, it may be speculated, are likely to confront Australian education institutions as they work towards compliance with reasonable adjustment laws.

The right to reasonable adjustment in assessment

The source of any right of Australian students with disabilities to reasonable adjustment in assessment lies within the parameters of anti-discrimination legislation. Australia has a two tiered system of protection against disability discrimination. At the federal level, the *Disability Discrimination Act 1992* (Cth) (*DDA*) prohibits discrimination in the protected area of education.[2] Each state and territory has a generic anti-discrimination or equal opportunity act. In Queensland, for example, the *Anti-Discrimination Act 1991* (Qld), prohibits discrimination on the ground of impairment[3] in the protected area of education.[4] Under the *DDA* the protected attribute is described as 'disability', but under most state and territory acts, the equivalent protected attribute is 'impairment'. While, technically, disability and impairment have different meanings, in the Australian legislation they are defined in almost identical terms[5] to encompass a wide range of permanent and temporary, past, present and, in some cases, future,[6] physical, intellectual, psychiatric and sensory impairment.[7] The state and territory acts and the *DDA* are similar, but not precisely the same, in terms of definitions of discrimination and recognized exemptions. The complainant chooses whether to proceed under the *DDA* or the relevant state act, and it is up to the complainant to prove discrimination in order to remove any barrier to his or her educational opportunity.

When the *DDA* was passed it was commonly accepted that it, and similarly drafted state acts, imposed a positive duty of reasonable adjustment – that is, an obligation on institutions to be proactive in adjusting facilities and services to accommodate people with disabilities and to mitigate or remove any restriction on their inclusion which flowed from the way institutions operated.[8] Australian legislation at that time imposed no such express duty. Courts and tribunals were prepared to extrapolate an implied duty from the terms of the legislation which contemplated that special services and facilities may need to be provided for people with

disabilities.[9] When the issue ultimately came before the High Court of Australia, however, it was held that there was no such duty contained within the *DDA*.[10] By implication, there was no duty to be implied from state acts either.

Disability Standards for Education

In 2005, the *Disability Standards for Education* (Cth) (*Standards*) were passed under the authority of the *DDA*.[11] These *Standards* do impose a general obligation of reasonable adjustment.[12] Guidance about how this is to be achieved is provided in relation to a number of key aspects of the delivery of education services: enrolment;[13] participation;[14] curriculum development, accreditation and delivery;[15] student support services;[16] and the elimination of harassment and victimization.[17] It is also interesting to note that in relation to each of these aspects, the *Standards* set out not only the legal obligations of education providers but also student rights, 'consistent with the rights of the rest of the community'.[18] The *Standards* also set out 'measures of compliance' in relation to each aspect and these are of particular importance for the education institution as they act as benchmarks against which an education institutions performance may be assessed. The key obligation placed upon Education Providers by the *Standards* is to make 'reasonable adjustment' to the education environment to support the full inclusion of students with disabilities.[19]As such, the *Standards* shift, from the student to the education institution, the burden of ensuring the removal of barriers to equal opportunity in education. In 2009, the *DDA* was finally amended to incorporate a duty of reasonable adjustment across the areas protected by the Act.[20]The Standards are yet to be scrutinised in any detail by a court or tribunal. The most 'helpful' judicial statement as to their effect is found in the recent decision of the Federal Court in *Walker v State of Victoria*.[21] The Standards

> require no more of a government agency such as the [Victoria Education] Department than that, where necessary, it be alert to the need to adjust its normal practices when dealing with a disabled student; to consider, in consultation with the student or his or her parents, what reasonable adjustments to normal practices should be made to assist the student, and then to decide whether a particular adjustment is necessary and, if so, to implement it.[22]

Compliance with the *Standards* amounts to compliance with the *DDA*.[23] How compliance affects the operation of state acts is unclear, but it is likely that compliance with the *Standards* would make it factually difficult to prove discrimination.[24] That there appear to have been few claims alleging that the Standards have been breached may indicate that they are working well to achieve positive outcomes for students with disabilities. It may indicate that the guidance contained within the *Standards* has clarified the obligations of education institutions. It may also indicate, however, that disaffected students, and disability action groups which support them, have taken a wait and see approach before launching legal action. Certainly, as explained below, there are 'grey areas' which may give rise to future litigation.

Although the scope of the obligation to make reasonable adjustment under the *Standards* has not yet been settled by the courts, we can speculate about its extent from how actions alleging discrimination in assessment have been treated by courts and tribunals. There have been decisions about discrimination which have considered whether failures to provide services or facilities, or to change standard routines, have amounted to discrimination. If an educational institution has been held to have discriminated because it has failed or refused to make a reasonable adjustment, then it may be inferred that these are the kinds of adjustments which will be required under the Disability *Standards* regime.

Varieties of discrimination in Australian legislation

Australian discrimination prohibits two kinds of discrimination – direct and indirect. Direct discrimination arises when there is 'less favourable treatment' of the complainant. Whether treatment is 'less favourable' is determined by comparing the treatment of the complainant with the treatment of another without the complainant's disability, in 'circumstances which are not materially different'.[25] The classic example of direct discrimination in education arises when a student is refused enrolment because of their disability.[26] In assessment, it might arise when a student is excused (excluded?) from completing an examination because of their disability. While some students may see this as a relief, others may see it as an opportunity denied, as discrimination.

Indirect discrimination is also called 'facially neutral' or 'hidden' or 'institutional' discrimination. It occurs when treating people in the same way has a discriminatory effect on those with a protected attribute.[27] It arises when there is a 'condition' placed upon the inclusion of the person with disability (usually inferred from the facts); the person with disability cannot comply with the condition; and, either persons without the condition can comply with the condition, or the condition has, or is likely to have, the effect of disadvantaging persons with the disability. The classic case of indirect discrimination in education, perhaps, arises when a building is accessible only by steps. A discriminatory condition is imposed that in order to enter the building, a person must be able to climb steps.[28] Most cases of discrimination in assessment would be likely to be cases of indirect discrimination – cases where conditions are imposed on the student as they undertake an assessment task. These conditions may be explicit – 'this assignment must be submitted on 21 September', for example – or implied – 'to complete this exam you must be able to read and write'.

To defeat a claim of direct discrimination, education institutions may argue that to remove the discrimination would cause unjustifiable hardship to the institution. To defeat indirect discrimination, the respondent may seek to prove that the condition imposed is reasonable. Although it is not explicit in the legislation, the traditional approach taken by Australian courts and tribunals has been to regard unjustifiable hardship as attaching to claims of direct discrimination, and reasonableness as attaching to claims of indirect discrimination. This is because proof of unjustifiable hardship and reasonableness will engage similar arguments relating to cost, effect, inconvenience, benefit and detriment to those involved.[29]

Both reasonableness and unjustifiable hardship are also relevant to the *Standards* regime but in a different operational arrangement. Reasonableness is, by implication, a limit on any adjustment required. The *Standards* provide for the further limit, that a *reasonable* adjustment may be avoided if it would create unjustifiable hardship.[30] Because reasonableness and unjustifiable hardship are concepts that have been considered in the context of discrimination cases we can look to the decisions in those cases for insight into how they may operate to limit the scope of reasonable adjustment under the *Standards*. It is not clear, however, how the two limits of reasonableness and unjustifiable hardship will, in practice, interact as both cover similar territory. That both limits are contemplated by the legislation, however, suggests a fairly thick protection is provided to schools to resist requests

for expensive, difficult or disruptive adjustments.[31]

Reasonable adjustment in assessment – what does this entail in practice?

The relevant terms of the *Standards* impose an obligation to make reasonable adjustment to 'curriculum development, accreditation and delivery'[32]so as 'to give students with disabilities the right to participate in educational courses or programs that are designed to develop their skills, knowledge and understanding, including relevant supplementary programs, on the same basis as students without disabilities'.[33] Guidance about how reasonable adjustment in assessment is to be achieved is provided as follows:

- the assessment and certification requirements for the course or program are appropriate to the needs of the student and accessible to him or her; and...[34]
- the assessment procedures and methodologies for the course or program are adapted to enable the student to demonstrate the knowledge, skills or competencies being assessed.[35]

It is clear, then, that the *Standards* contemplate that reasonable adjustment may require changes to assessment requirements, assessment instruments and assessment conditions. A student with a disability, along with his or her parents or guardians, if appropriate, will have a say on the kinds of adjustments which they would prefer. The *Standards* mandate consultation between the education institution and student[36] but acknowledge that the school may suggest alternatives which are less 'disruptive'.[37] A series of poisonous discrimination cases in Australia where schools, and sometimes parents, have been criticised by courts and tribunals for intransigent resistance to reasonable cooperation, has left the clear message that it is imperative for school staff and students and their families to keep in regular, respectful communication about the impact of the relevant disability and its management.[38]

The variety of individual disabilities, assessment circumstances and school subjects makes it difficult to state that any one variety of adjustment will always be reasonable. The best that can be said, perhaps, is that the following kinds of adjustments are made available in Australian education institutions – unless they operate, in a particular context, to undermine the integrity of an assessment item:

- Extra time to finish an exam or assignment
- Supervised rest, food and medication breaks in examinations
- Adjustment to the format of an exam paper – font, paper colour and size, paper 'masks'
- Separate venues to minimize distraction or to accommodate assistance animals
- Alternatives to writing – viva voce, examination, scribe, assistive technology
- Alternatives to reading – brailed and/or taped materials, assistive technology
- Alternatives to hearing – written stimulus materials, translators, assistive technology
- Alternatives to speaking – written rather than spoken responses allowed, private rather than public performances.

Adjustments become controversial when they threaten to undermine the integrity of an assessment instrument or schedule by compromising its rigour or its capacity to assess the skills or content required to be assessed. If the skill to be assessed is spelling can an adjustment of allowing access to a computer with spell check in an examination be

reasonable? Is it necessary, however, that spelling be assessed? Educators must always be alert to what the curriculum for any subject mandates as the content and skills to be assessed. While spelling may be an essential element of communication in English, it may not be for Maths. Moreover, even if it is an essential element of the English curriculum, it may not be necessary or appropriate for it to be assessed in every assessment item.

Australian controversies in reasonable adjustment

The Australian law on the 'integrity' controversy and on other assessment controversies will now be explored. Because the *Disability Standards for Education* have not, as yet, been examined in any detail by an Australian court, the case examples given will be cases involving claims of discrimination in education. Not all these cases are 'assessment' cases but they raise issues which are relevant to the way assessment is handled.

Reasonable adjustment and integrity of assessment

The Australian law is clear there is no requirement that an education institution take steps to pass a student who is failing a course simply because he or she has a disability. This remains the case even when the disability is clearly causally related to the failure. A distinction must be drawn between adjustments to the way a piece of assessment is structured, formatted, delivered and to be completed, and adjustments to the standard of essential skills or knowledge to be achieved in order to complete the piece of assessment. It may be speculated that the former kind of adjustments will almost always be required, the latter kind almost never.

The *Standards* explicitly recognise a limit to the notion of 'reasonable adjustment' in respect of students who cannot meet legitimate course requirements:

> In assessing whether an adjustment to the course of the course or program in which the student is enrolled, or proposes to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature.
>
> *Note* In providing for students with disabilities, a provider may continue to ensure the integrity of its courses or programs and assessment requirements and processes, so that those on whom it confers an award can present themselves as having the appropriate knowledge, experience and expertise implicit in the holding of that particular award. [39]

Aside from the express terms of the *Standards*, a long list of decided cases, including *Brackenreg*,[40] *W*,[41] *Chung*[42] and *Reyes-Gonzalez*[43] demonstrates that tertiary institutions will not be required to continue to accommodate those students whose impairments mean that they do not have the capacity to 'pass' their course.[44] These cases give some guidance on the threshold point at which 'reasonable' adjustment becomes 'unreasonable'. Although the decided cases involve tertiary students, where passing or failing has an impact on future employment prospects, the reasoning process informing the cases is relevant to the certification processes at the compulsory levels of education too. In Australia, students receive senior certificates and a tertiary entrance score upon the completion of grade 12 at age 17 or 18. At present, different certification protocols apply in each state but a move to a national curriculum and national certification is underway.

The *Anti-Discrimination Act 1991* (Qld) (QADA) case, *Brackenreg v Queensland University of Technology* concerned a student excluded from the Bachelor of Laws degree course at Queensland University of Technology (QUT) as she was 'in breach of both the double fail rule and the progression rule'.[45] Brackenreg had syringomyelia and cervical cancer, and, most significantly for her studies, Attention Deficient Hyperactivity Disorder (ADHD). President Copelin of the Queensland Anti-Discrimination Tribunal (QADT) found that Brackenreg's 'difficulties with her studies' were not due to less favourable treatment or failure on the part of QUT to make reasonable adjustment to her assessment regime: 'the complainant's disability was taken into account and certain adjustments were made'.[46] President Copelin found that Brackenreg's difficulties 'were attributable … to her disabilities, to circumstances in her personal life, and studying as an external student'.[47] There were, perhaps, 'multiple causes' for the complainant's difficulties but none of them was any failure to adjust by QUT:

> In this case the evaluation by the respondent of the complainant's academic performance before and at the time of her exclusion from QUT may have reflected a manifestation of the symptoms of the complainant's disabilities. However, even when consideration was given to the complainant by the respondent for her disabilities, such as giving her extra time to complete exams, extensions of times in handing in assignments, and by giving her conceded passes on numerous occasions after considering her circumstances, she still demonstrated an inability to satisfactorily complete a law degree to the standard required by the respondent.[48]

President Copelin made the clear finding that '[t]here is no obligation on the respondent to pass a student just because they have a disability'[49] and held that the respondents had acted appropriately and to the extent required by law to accommodate the disability of the complainant.

In a similar case, *W v Flinders University of South Australia*,[50] brought under the *DDA*, the complainant was excluded after failing to meet the course requirements of her teaching degree. W had been diagnosed with a psychiatric disorder, the symptoms of which included 'depression, short term memory loss, poor concentration, withdrawn and racing thoughts, hypermania, confusion, forgetfulness, thought disorder, and anxiety'.[51] Commissioner McEvoy of the Human Rights and Equal Opportunities Commission (HREOC) held that university staff acted appropriately to accommodate W's disability – granting extensions, undoing late penalties and redesigning her assessment schedule.[52] A particular focus of W's complaint was that she was not permitted to undertake her teaching practicum on the part time basis she requested. The university negotiated for her to attend the practicum from Monday to Thursday for 10 weeks instead of Monday to Friday for 8 weeks. The complainant, however, sought an arrangement whereby she worked Monday, Tuesday, Thursday and Friday. Commissioner McEvoy accepted the respondent's submission that the practicum 'had to be performed on four consecutive days in order to maintain the academic integrity of the subject'.[53] Like the QADT in *Brackenreg*, Commissioner McEvoy emphasised that a university is 'not obliged to forgo the academic requirements of its course for people with disabilities'[54] and attributed W's difficulties not to her treatment by the university but to her disability:

> … I am satisfied that the complainant's complaints cannot be sustained under the Act. Her circumstances clearly demonstrate many of the difficulties which persons with disabilities may face but I am satisfied that she was not discriminated against either directly or indirectly by the respondent on the basis of her disability … None of those difficulties resulted from

> discrimination on the basis of her disability, although they may well have resulted from her disability itself. [55]

Reasonable adjustment and learning disorders

Learning disorders are expressly covered in the *DDA* and most state acts and have been explicitly acknowledged as protected disabilities in the case law.[56] What little case law there is in this area suggests that adjustments to assessment will, prima facie, be required for students with learning disorders. In *Bishop v Sports Massage Training School Pty Ltd*[57] the complainant, who had dyslexia, narrowly failed a written examination causing him 'a delay in his career and a significant loss of self-esteem'.[58] The HREOC found that the respondent 'required [Bishop] to complete the examination in the same two-hour period as the other, able-bodied students'[59] and that '[t]here [was] a real chance that had [the complainant] been given an extra half-hour, or had the examination been conducted orally in his case, he would have passed'.[60] The complainant was awarded $3,000 damages to compensate him for losses including the cost of relocating to another massage school where his disability was properly accommodated.

Despite the clear example of the *Bishop* case, however, the accommodation of learning disorders has been resisted by some Australian education institutions. The Queensland Studies Authority (QSA), for example, which supervises external examinations and higher school certification processes for Queensland students, has been reluctant to make available a full suite of accommodations for students with learning disorders. For external examinations, sat by distance education and home schooled students in Queensland, QSA published guidelines suggest that students will be allowed extra time and access to a computer, but not access to spell check, use of a dictionary, reader or scribe. For the Core Skills Test, sat by all Queensland students seeking a tertiary admission 'score', guidelines suggest that separate supervision, or seating 'out of order' may be allowed to minimize 'distractions', and a computer may be allowed for some tests requiring extended, written responses, but extra time, rest breaks and 'spell check' are not available. These approaches apply regardless of whether accuracy of expression, or speed of reading and understanding, are integral to what is being assessed in a particular examination.[61] The rationale in respect of the Core Skills Test appears to be that these elements of expression are integral to *everything*:

> A student's overall test result is based on achievement in the common elements of the Queensland senior curriculum on which the test is based (the 49 CCEs). The CCEs include recognising letters, words and symbols, and using correct spelling, punctuation and grammar, which are part of reading and writing.
>
> We do not expect all students to be able to complete all tasks on a test paper but we make every effort to ensure that all students can access all tasks. The time allowed for each test paper is such that students have sufficient time to attempt all tasks.
>
> We approve variations in order to remove, as far as possible, a barrier that would prevent a student participating in the test but not to compensate for the student's lack of achievement in an area the test assesses.
>
> We assess and certify the actual achievement demonstrated in the test, including achievement in the CCEs which all include and depend on reading and writing in Standard Australian English.[62]

Despite the best attempts of disability advocates to defeat such misconceptions, another rationale underpinning the reluctance to adjust for learning disorders may be inferred as a reluctance to 'advantage' students with a disability. This was the rationale advanced in the NSW assessment case *BI v Board of Studies*[63] where a student with Attention Deficit Disorder (ADD) was granted rest breaks but not extra time for his Higher School Certificate examinations (Year 12 certification).[64] It may be speculated that while accreditation and certification bodies promulgate 'one size fits all' policies, more cases like BI, which challenge the blanket application of adjustment policies is likely. BI's case failed because the New Wales Supreme Court accepted that, despite the mandatory nature of the policy under consideration, there was discretion to vary the policy upon proof of need, and that BI had not proved such a need. A future complainant, drawing on the experience of BI, may have more success in pleading his or her case.

Reasonable adjustment when a student can 'cope' with an assessment task as designed

Another problematic response to disability is to assume that an adjustment to assessment is not necessary because the student can 'cope' with it unadjusted. The *DDA* case, *Hurst v State of Queensland*,[65] is not explicitly about assessment but it demonstrates a hardy approach to class room practice which may unwittingly result in unlawful discrimination, including in assessment. In *Hurst* the complainant alleged discrimination in that she was not provided with an Auslan interpreter to assist her in class. Tiahna Hurst was profoundly deaf and grew up using Auslan, the Australian indigenous sign language, to communicate. When she enrolled at primary school she was told that an Auslan interpreter would not be provided because Education Queensland used signed English interpreters instead to support its students with hearing impairments. The case was constructed as an indirect discrimination case – a condition was imposed on Tiahna that she receive her education without the support of an Auslan interpreter. At first instance, it was held that Tiahna could comply with this condition and that, therefore, she could not prove the elements of indirect discrimination. Tiahna was a clever child and had been well supported by therapists arranged privately by her family and the evidence was that she could 'cope' with a signed English interpreter.

On appeal, however, the Full Court of the Federal Court of Australia held that even if a student could 'cope' with the way their education was delivered, this did not amount to their compliance with a condition that it be delivered in that way. Tiahna could, technically, 'cope' with a signed English interpreter, but to expect her to do so would compromise her educational opportunities and prospects for achievement.[66] The assessment ramification for schools of this decision is that assumptions should not be made about what a student can 'manage' in terms of assessment conditions – adjustments should be made to remove barriers to optimum performance which are related to a student's disability.

Reasonable adjustment and students who are apparently succeeding in their studies

It should not be assumed that assessment discrimination claims will be made only by students who fail. Students may cry discrimination if they believe they could have done better had certain adjustments been made. They may initiate legal action if their poorer than anticipated performance excludes them from future opportunities, or even if their pride is hurt. In *Hinchliffe v University of Sydney*[67], a student with a visual impairment claimed that she had been the victim of discrimination in that the University of Sydney had failed to provide course materials to her in an accessible form. The case is interesting because, unlike other

Australian university cases, the complainant was not failing subjects. On the contrary, she achieved a distinction, two credits and four passes in her first semester of studies in Occupational Therapy at the University of Sydney and a high distinction, three distinctions, a credit and four passes in the second semester.[68] By her own admission her results would 'probably not be perceived as being poor'.[69] Her claim was, nevertheless, that her academic future had been compromised by what she presented as the University's failure to provide her with course materials in an acceptable format which accommodated her disability. She was not successful, however, in proving her case of indirect discrimination, with Driver FM finding that the actions of University disability support staff were 'sufficient and adequate'.[70]

Reasonable adjustment and unknown disability

In the UK the legislation explicitly provides that there can be no discrimination on the basis of an 'unknown' disability.[71] Australian legislation is silent on the point but case law suggests that it will be difficult to prove a causal link between a disability and treatment if the disability is not known to the potential discriminator. The case of *Sluggett v Flinders University*[72] is one of a number of cases where students have failed to prove discrimination because they have failed to reveal their disability until after they have suffered some harm on its account. Sluggett, who had mobility impairments alleged discrimination in that she had been allocated class rooms and a work placement which were not accessible to her because her disability. Sluggett did not inform the respondent university of her impairment until after she experienced difficulties getting to classes on the hilly campus of Flinders University and climbing a spiral staircase while on work experience. It was held that the University had not failed to make adjustments to her disability – Sluggett herself had been at fault in not alerting the university to her condition and accessing available support.

If some responsible staff member knows of the disability, however, it seems that the school administration responsible for ensuring adjustments are made will be deemed to know. This point is clear from the facts of *Bishop*, discussed above. While the Sports Massage School administration argued that Bishop had 'had not done enough to bring his disability to its attention prior to the examination', HREOC held that it was sufficient that he had told his lecturer.[73]

There is a potential problem for schools relating to unknown disabilities, and particularly unknown learning disorders, in that teachers are, notionally, trained to suspect and detect potential learning disorders from the behaviour of their students. This point was made by the New South Wales Administrative Appeals Tribunal in *Chinchen v NSW Department of Education and Training*[74] a case brought under the *Anti Discrimination Act 1977* (NSW). Rhys Chinchen had been classified as 'gifted' but, nevertheless, failed to thrive in his primary school extension classes. When he did not perform as expected, he was regarded as 'lazy and unmotivated'[75] and relocated to a regular class. At first instance, the school was found to have discriminated against Rhys in its failure to refer Rhys for assessment by a school counselor equipped to diagnose learning disorders.[76] The case ultimately failed on appeal for technical reasons relating to the way it had been pleaded, but the point made by the tribunal is still valid. A school cannot claim that it did not know of a disability if its staff should have recognized the signs:

> … [it] is clear that teachers do not have the expertise and training to diagnose motor dyspraxia. Nonetheless, in accordance with the Respondent's policies, they have a responsibility to ensure that students are educated to their full potential and to be alert to any learning difficulties which might inhibit this…We are satisfied that in 1999 the characteristics

> of Rhys's disability . . . were evident to [teaching staff] Ms Hawkes and Mr Ogilvie. The characteristic, difficulty completing tasks under a time constraint, is of particular significance. It was clear to the School that although Rhys was experiencing difficulty completing tasks in class, none of the strategies introduced by Ms Hawkes had proved effective. In these circumstances, the School had a responsibility to investigate the matter further by seeking the intervention of the school counsellor.[77]

Reasonable adjustments and timing issues

As noted earlier, the *Disability Standards* impose an obligation on education institutions to consult with students and, if appropriate, their parents or guardians, as to adjustments which should be made. The *Standards* also require education institutions to 'assess whether the adjustment may need to be changed over the period of a student's education or training'.[78]A couple of cases indicate the problems that can flow from communication problems between school and student, from situations when the school has not been kept informed of the student's circumstances, or the student has not been kept informed of the school's plans.

The Hinchliffe case, discussed above, illustrates problems that can flow for a student who fails to keep his or her school informed about changed preferences in terms of adjustments to be made. Upon enrolment, Hinchliffe had provided the university with very clear details as to the format in which she would require course materials to be made available to her. Specifically, it was her preference that material be provided in an enlarged font on light green paper. It is significant, however, that during the course of her studies Hinchliffe discovered that she preferred materials to be provided, where possible, in an audio format. While the court accepted Hinchliffe's allegations that there were delays in the provision of materials, it attributed these delays, in large part, to the fact that the university was initially unaware of the changed preference and to the fact that it was more time consuming to produce audio than paper based materials.[79]

A recent controversial Queensland case shows the problems that may arise if a school is slow to make decisions about adjustments to be made. *Beanland v State of Queensland and Queensland Studies Authority*[80] involved a secondary school student who, because of a variety of physical and sensory impairments, could not read or write. He brought a discrimination action against his state school claiming that he was denied the opportunity to study English and German in Year 11 and 12 because the school believed that he would not be able to complete assessment in mandatory skills in these subjects. The respondent school won the case because Beanland could not prove that it had actually refused to adjust assessment requirements to allow him to study his preferred subjects before he left to attend a more accommodating school. The respondent was criticized, however, for its slow processing of Beanland's requests and the clear implication of the decision is that education institutions must manage adjustment processes promptly and efficiently in order to avoid causing detriment to affected students.

Conclusion

There is little doubt that the accommodation of students with disabilities consumes significant resources and causes significant anxiety for education institutions and their staff. Perhaps the most problematic aspect of the process of accommodation is that each student is unique and so too are the demands of each disability. The planning and implementation of adjustments to assessment must be tailored to each individual case. For similar reasons, the decided cases can only give only so much guidance. Courts and tribunals are careful to point out, particularly when a complainant wins, that in the area of disability discrimination each case 'turns on its facts' and that what worked or didn't work in one case cannot necessarily be applied as a precedent in others. There is, however, one theme which runs across the cases – teachers who develop good relationships with their students with disabilities, and who act with good will when negotiating strategies to support their students' educational opportunities, almost always win.

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[1] In 2008 the National Assessment Program – Literacy and Numeracy (NAPLAN) program commenced in Australian schools. Each year all students in Years 3, 5, 7 and 9 are assessed on the same days, using the same tests, in Reading, Writing, Language Conventions and Numeracy.

[2] *Disability Discrimination Act 1992* (Cth) (*DDA*) s 22.

[3] *Anti-Discrimination Act 1991* (Qld) s 7(h). Examples of state legislation throughout will be taken from the *Anti-Discrimination Act 1991* (Qld).

[4] *Anti-Discrimination Act 1991* (Qld) ss 38 and 39.

[5] See, for example, *DDA* s 4, *Anti-Discrimination Act 1991* (Qld) schedule dictionary.

[6] See, for example, *DDA* s 4.

[7] To minimise confusion, the term disability will be used throughout this paper to encompass both disability and impairment.

[8] See, for example, Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth), Commonwealth, *Parliamentary Debates,* House of Representatives, 26 May 1992, 2750 (Brian Howe, Deputy Prime Minister).

[9] See, for example, AJ v A School [1998] HREOC No. H97/168 (Unreported, Wilson P, 23 March 1998), *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999).

[10] See *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 121 [87] (McHugh and Kirby JJ), 155 [203] (Gummow, Hayne and Hayden JJ).

[11] Note that the *Standards* are currently under review.

[12] *Standards* Part 3.

[13] *Standards* Part 4.

[14] *Standards* Part 5.

[15] *Standards* Part 6.

[16] *Standards* Part 7.

[17] *Standards* Part 8.

[18] *Standards* Introduction.

[19] *Standards* s 3.4 note.

[20] *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

[21] *Walker v State of Victoria*[2011] FCA 258 (Tracey J, Federal Court of Australia, 23 March 2011). Reasonable adjustment in assessment was not in issue in the case.

[22] Ibid, [274].

[23] *DDA* s 34.

[24] For more detailed discussion of this issue see Elizabeth Dickson, 'Disability Standards for Education and the Obligation of Reasonable Adjustment' (2006) 11(2) *Australia and New Zealand Journal of Law and Education* 23.

[25] *See for example, DDA s 5, Anti-Discrimination Act 1991 (Qld) s 10.*

[26] *See, for example, Hills Grammar School v Human Rights and Equal Opportunity Commission [2000] EOC ¶93-081*.

[27] See for example, *DDA* s 6, Anti-Discrimination Act 1991 (Qld) s 11.

[28] See, for example, *Cocks v. State of Queensland* (1994) 1 QADR 43, *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4 (Unreported, Commissioner Atkinson, 27 February 1997).
[29] See, for example, *DDA* s 11 (unjustifiable hardship) and *Clarke v Catholic Education Office & Anor* [2003]202 ALR 340 (reasonableness), *Anti-Discrimination Act 1991* (Qld) ss 5 (unjustifiable hardship) and 11 (reasonableness).
[30] *Disability Standards for Education 2005* (Cth) s 10.2.
[31] For more detailed discussion of this issue see Elizabeth Dickson, 'Disability Standards for Education and the Obligation of Reasonable Adjustment' (2006) 11(2) *Australia and New Zealand Journal of Law and Education* 23.
[32] See *Standards* Part 6.
[33] *Standards* s 6.1.
[34] *Standards* s 6.3(f)
[35] *Standards* s 6.3(f).
[36] *Standards* s 3.5.
[37] *Standards* s 3.6.
[38] See, for example, *Murphy and Grahl v The State of New South Wales (NSW Department of Education) and Wayne Houston* [2000] HREOC NoH98/73 (Unreported, Commissioner Carter, 27 March 2000), *Travers v New South Wales* (2001) 163 FLR 99 (Federal Magistrates Court) and *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002).
[39] *Disability Standards for Education 2005* (Cth) s 3.4(3).
[40] *Brackenreg v Queensland University of Technology* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999).
[41] *W v Flinders University of South Australia* [1998] HREOCA 19 (Unreported, Commissioner McEvoy, 24 June 1998).
[42] *Chung v University of Sydney* [2001] FMCA 94 (Unreported, Driver FM, 20 September 2001).
[43] *Reyes-Gonzalez v NSW TAFE Commission* [2003] NSWADT 22 (Unreported, Ireland J, Members Silva and Strickland, 3 February 2003).
[44] See *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4(v)].
[45] *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.1.3(vii)].
[46] Ibid [4.2.2.4].
[47] Ibid [4.2.1.3].
[48] Ibid [2.2.4(iv)].
[49] *Brackenreg* [1999] QADT 11 (Unreported, Copelin P, 20 December 1999) [4.2.2.4 iv].
[50] *W* [1998] HREOCA 19 (Unreported, Commissioner McEvoy, 24 June 1998).
[51] Ibid [4.1].
[52] Ibid [6.4.3]. [7].
[53] Ibid [4.7], [7].
[54] Ibid [6.4.3].
[55] Ibid [7].
[56] See, for example, *Bishop v Sports Massage Training School* [2000] HREOC No H99/55 (Unreported, Commissioner Cavanough, 15 December 2000).
[57] *Bishop v Sports Massage Training School* [2000] HREOC No H99/55 (Unreported, Commissioner Cavanough, 15 December 2000).
[58] Ibid [1].
[59] Ibid.
[60] Ibid.
[61] See Queensland Studies Authority, *2010 Senior External Examination Handbook* (2010) 27; Queensland Studies Authority, *Queensland Core Skills (QCS) Test Special Provision* (2010) 11, 30.
[62] See Queensland Studies Authority, *2010 Senior External Examination Handbook* (2010) 27; Queensland Studies Authority, *Queensland Core Skills (QCS) Test Special Provision* (2010) 11, 30.
[63] *BI v Board of Studies* [2000] NSWSC 921. *BI* is a judicial review case, not a discrimination case.
[64] BI v Board of Studies [2000] NSWSC 921 [28] [42] [52].
[65] *Hurst v State of Queensland* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006).
[66] There are obvious parallels between the decision in *Hurst* and the decision in the UK race discrimination case, *Mandla v Dowell Lee* [1983] 2 AC 548. In *Mandla v Dowell Lee* it was held by the House of Lords that while a

Sikh boy could 'theoretically' comply with a school 'no turban' rule he could not 'in practice' comply without compromising his legislatively protected cultural beliefs.

[67] *Hinchliffe v University of Sydney* [2004] FMCA 85 (Unreported, Driver FM, 17 August 2004).

[68] Ibid [66].

[69] Ibid [25].

[70] Ibid [121].

[71] *Equality Act 2010* (UK) c 15, s 15(2).

[72] *Sluggett v Flinders University of South Australia* [2000] HREOC No H96/2 (Unreported, Commissioner McEvoy, 14 July 2000)

[73] *Bishop v Sports Massage Training School* [2000] HREOC No H99/55 (Unreported, Commissioner Cavanough, 15 December 2000) 2.

[74] *Chinchen v NSW Department of Education and Training* [2006] NSWADT 180 ('*Chinchen*').

[75] Ibid [29].

[76] Ibid [303]

[77] Ibid [193]-[194].

[78] *Standards* s 3.6(b).

[79] *Chinchen* [118]-[119].

[80] *Beanland v State of Queensland and Queensland Studies Authority* [2008] QADT 5.